ALTERNATE

DISPUTE

RESOLUTION

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by

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ABSTRACT

In an effort to save taxpayer dollars and ease an overburdened administrative and judicial court system, this report presents evidence to encourage the use of alternate dispute resolution (ADR) in construction contracting within the Naval Facilities Engineering Command. Information is presented detailing the primary factors that contribute to this expensive and overburdened system, including: costs associated with litigation, contractual document formation, experience level of junior project managers, and adversarial relationships that tend to develop between government agencies and construction contractors.

Research on court cases and associated cost data was limited by geographical region, specifically, the Southern Division, Naval Facilities Engineering Command, Charleston, South Carolina. Also included is related information from the Department of Defense administrative hearing agency, the Armed Services Board of Contract Appeals.

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LIST OF ACRONYMS

ADR - Alternate Dispute Resolution. Methods for resolving contractual disputes in lieu of court litigation.

ADRA - Administrative Disputes Resolution Act of 1990. Passed by 101st Congress to encourage use of alternate dispute methods.

ASBCA - Armed Services Board of Contract Appeals. Department of Defense's administrative hearing agency.

C. O. - Contracting Officer.

CONREP - Construction Representative. ROICC construction inspector responsible for ensuring contractor's compliance with plans and specification.

CQC - Contractor's Quality Control. Representative on construction site responsible for all quality control.

DRB - Dispute Resolution Board. Administrative board responsible for resolving disputes at lower administrative levels.

EFA - Engineering Field Activity. Regional divisions of Naval Facilities Engineering Command, smaller scale than EFD.

EFD - Engineering Field Division. Regional divisions of Naval Facilities Engineering Command.

FAR - Federal Acquisition Regulation. Guidelines which govern all government procurement activities.

NAVFAC - Naval Facilities Engineering Command. The agency responsible for all construction contracting within the U. S. Navy.

ROICC - Resident Officer in Charge of Construction. Lowest level of NAVFAC, responsible for construction contracting at individual bases. Also used to denote the senior officer in the office.

SOUTHDIV - Southern Division, Naval Facilities Engineering Command located in Charleston, South Carolina.

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CHAPTER I

INTRODUCTION

"He who enters into negotiations with the intentions of fighting for his own position has *already lost*."

W. Edwards Deming

Over the past several decades, American society has become more litigious and, if current trends are any indication, this passion for lawsuits will continue soaring to new heights in the future. Of all the different types of businesses that contribute to the escalating volume of litigation, the construction industry is said to be a leading culprit.

As with similar governmental construction contracting agencies, the litigation trend for the U. S. Navy has kept pace with the civilian sector. The typical endnote for most Navy construction contracts is for construction contractors routinely to submit claims that routinely get forwarded through the disputes process. There is one important distinction, however. Unlike civilian practice, relatively little attention has been paid to the latent features inherent in contractual disputes processed through a burdensome government system. Features such as administrative costs, preservation of a reputation, and recognition of an often-faulty document formation process are seldom acknowledged in the government construction contracting arena.

Certainly managers working in the private sector pay close attention to the cost of resolving contractual business disputes. The benefits of a favorable decision in a lengthy court battle are carefully weighed against factors such as

reputation, administrative costs, issue complexity, and length of time for resolution. If a corporate manager fears there is even the slightest chance of an unfavorable decision, he/she will often opt for the method of resolution that is timely and mutually beneficial to all parties.

This type of "business decision" has not been prevalent in government construction contracting practices. Beginning in 1954, with the Wunderlich Act and the Contract Disputes Act of 1978, the government's disputes process has evolved into a system that lends itself to rubber-stamping of claims at all levels, with an ultimate destination at the Armed Services Board of Contract Appeals, (ASBCA). The result is an expensive and burdensome legal process that, in many instances, costs more money to administer than the claim is actually worth.

Changes are necessary to a system that spends $10,000 to resolve a $1,000 dispute. Some might argue that this is just the cost of doing business; many taxpayers would argue for change.

As stewards of public funds and given the austere budgets that lie ahead, where personnel and resources will be stretched to the limit, it is imperative that Navy contract personnel establish new and creative ways to resolve disputes.

Win-Lose vs. Win-Win

W. Edwards Deming never spoke truer words than those quoted on the previous page. However, based on personal experience, an attitude of "us against them", if allowed, can pervade the Navy construction contracting business. The goal, some think, is that after negotiations, one party wins, one party loses. Alternatively, if a system is adopted that provides for a win-win solution, results can have far-reaching impacts.

Reactions to claims often manifest themselves in the following pattern: The average project manager, if not attuned, becomes personally insulted if a contractor submits a request for equitable adjustment or a claim. Once the claim is received, the heels are firmly dug in and the fight begins. It is "us against them", a battle to the end. Many government project managers tend to take on a sense of duty; representing the government product (the plans and specification) and the process (contract administration) as flawless. Assured that the plans and specifications cannot be wrong, the manager assumes the contractor is just out to make an extra dollar through the modifications process. Given this sense of duty, a typical response for the biased project manager is to search the plans and specifications for any/all possible contractual bits of evidence to counter the contractor's claim. Once pieced together, the claim is automatically submitted to the next higher echelon for their review and determination. The expensive resolution process begins.

With this "us vs. them" attitude pervading the agency, additional cost inflation can occur. The contractor, knowing he is in for a fight, may tend to inflate his costs so that a profit is still possible after negotiations are concluded. At the risk of stereotyping, another point bears repeating that follows this same line. Given the tight, competitive bidding process, there is little room for the contractor to lose money in negotiations. The shrewd government project manager who beats the contractor down on one particular modification may have won the battle, but the contractor will do everything he can to win the war, even if that means cutting corners on future work or inflating the costs on future, uncontested modifications.

Recognition of inherent flaws in the document formation process and of the common legal pitfalls in government contracting can serve as additional justification for the adoption of alternate resolution methods. First, the feelings of personal attack, though common, can be eliminated with the realization that modifications and subsequent claims are commonplace within the Navy's construction contracting due to, among other reasons, a disjointed contract formulation process. Second, the complexity of the legal issue plays a key role. The project manager must be familiar with the contractual issues that can undermine a seemingly obvious government position, i.e., constructive notice or ambiguous plans and specifications.

An improved process that produces an unbiased review of the contractor's claims and subsequent alternate dispute resolution methods not only has immediate cost-savings benefits for all parties, but long-term benefits for the organization. The relationship between contractor and government agency can be improved. The adversarial relationship that develops as a result of the "us vs. them" attitude can be replaced with a relationship built on trust and respect. Contractors can be treated as partners in the process instead of adversaries. Finally, if contractors and government agents both know when entering negotiations that each will be treated fairly, the adverse, hidden effects of the typical disputes process can be lessened.

Critics Corner

Before the critics refuse to read further, an important distinction should be made. The premise for this report is to suggest a more proactive use of alternate dispute resolution methods primarily due to the costs associated with litigation.

Given the administrative costs associated with the various levels in the claims process, presumably a dollar threshold can be established that would suggest pursuit of alternate means of resolution. Obviously, a $1 million claim submitted on the basis of a complicated legal principle where the government's position appears solid is more worthy of disposition through an expensive court system than a $2,000 claim based on, for example, constructive notice. It is, therefore, the smaller value claims that are used as the basis of this report.

One additional point is provided to answer an often-used response to the arguments that are being presented. Many government agents would argue for continuation of the existing litigation process due to the importance of setting a precedent on important legal matters. While alternate dispute resolution does not yield itself to establishing precedent and many important decisions have been handed down that are referred to in subsequent cases, the uniqueness of construction contracting tends to nullify this argument. Every construction contract is unique. The primary and most obvious distinction is that the scope of work is unique unto itself. Every construction contract has its own set of plans and specifications, completion time, weather conditions within which to work, etc. Even standard guide specifications are altered to meet the specific requirements of a particular project scope of work. No two sets of construction documents are exactly the same. It follows that the set of facts that create the contractual dispute is unique to a particular contract claim for damages. Unless the issue revolves around a rule of law, the precedent issue does not seem to apply.

The final distinction that should be made is that this report and its conclusions are based upon the types of contractual disputes that are most common within the practices of the U. S. Navy, i.e., changes in scope of work, differing site conditions, etc. Issues such as termination for default or convenience are not addressed.

Summary

The goal of this report is to provide a basis that encourages the young Navy project manager, after end-of-the-job claims begin pouring in, to take a step back after the dust settles and attempt to make an unbiased assessment of the issues and consider an alternate, less expensive means of dispute resolution. This assessment is especially important when the project manager is faced with claims valued under $10,000 that revolve around misunderstood legal principles.

CHAPTER II

BLINDERMANN v. UNITED STATES

It is not difficult to find a case that provides an excellent example of the arguments that are being presented in this report. *Blindermann Construction Co., Inc., v. the United States*[1] is an example of a case where time, money, and reputation could have been saved had the practices that this report espouses been employed.

The case was heard by the U. S. Court of Appeals, Federal Circuit in December, 1982 as a result of the ASBCA's denial of the contractor's claim for additional costs. The primary issue at hand is the claim for approximately $45,000 that resulted from delay costs associated with the contractor's inability to gain access to approximately 60 apartment units.

In March 1978, Blindermann Construction Co. contracted with the Navy to furnish and install various utility improvements in 656 individual units of base housing. The contract completion date was 3 October 1978 as extended by modification. Throughout the course of the contract, the contractor had difficulty contacting the occupants of approximately 60 units which caused a delay in the completion date. The contract was not completed until 20 October 1978 and the contractor was charged by the Navy with liquidated damages of $2,975 for 17 days of inexcusable delays.

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[1] See 695 F. 2d. 552 (1982). The information presented represents the key issues applicable to this report. The case contains multiple claims and was affirmed in part and reversed in part and remanded for determination of apportionment due to concurrent delays.

At issue was the interpretation of the standard scheduling of work clause which read:

> SCHEDULING OF WORK: Work shall be scheduled to issue minimum disruption of service to the housing units. The contractor shall notify the occupants of the housing unit[2] at least 3 days prior to commencing any work in a housing unit. The contractor shall perform his work between the hours of 8:00 a.m. and 5:00 p.m. and having once started work in a housing unit shall work to completion in consecutive work days.

After the contractor had prepared and delivered to the Navy a progress chart showing when the contractor required access to the buildings, the contractor's quality control manager (CQC) had the responsibility for notifying the occupants of the time when the work in their apartment was to be performed. Although the specifications required a 3-day notice, the CQC made attempts to give up to 7 days notice for convenience of both the occupant and the contractor.

Notices were given in the morning, during the noon-hour, or in the afternoon. The CQC also made attempts to contact occupants in the evening if attempts had failed during the day.

The contractor experienced many setbacks and delays as a result of the occupants. Some occupants refused entry into the unit even after notice was given. In some instances, the contractor was unable to deliver personal notices because the occupants were on leave for periods up to 2 weeks. In other instances, occupants would go out during lunch while the work was being performed, leaving their doors locked with the workmen's tools inside. On most of the occasions, the occupants were simply not home when the work was scheduled despite notices given to them in person or by a card left on the doorknob. The card on the doorknob was a suggestion given to the contractor by the Navy project manager after several instances of entry problems.

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[2]An amendment to the IFB changed "contracting officer" to "occupants of the housing unit."

Whenever the contractor or subcontractor was unable to gain access to an apartment, they would call the project manager. The project manager either attempted to contact the occupants and ask them to return home or obtain entry using a master key after the occupants gave verbal approval. Many times, the work was delayed for several days and the efficiency and sequence of work was hindered due to the coordination required by the various divisions of labor. Buildings were left with work unfinished in order to backtrack and complete a unit that was made available.

Shortly after experiencing the delays, the contractor notified the project manager of his intentions to submit a claim for the delays. He felt that his obligations had been met once the occupants were notified. On 1 December 1978, after contract completion and subsequent assessment of liquidated damages, the contractor submitted his claim.

The project manager took a position that was inconsistent with his conduct during the performance of the contract (probably as a result of letting personal feelings interfere as described in Chapter 1). He felt the delays were due to the failure of the contractor to notify the occupants as required by the specifications, and that placing cards on the doorknobs of the units did not constitute notification, because the occupants could have been on leave at the time. This is even after *he* had suggested use of the doorknob cards! He also denied that the government had the responsibility for assisting the contractor to obtain access to the apartments.

The government's claim process began. The Contracting Officer issued a final decision that was in agreement with the project manager. The contractor requested remedies to the ASBCA in accordance with the Contract Disputes Act of 1978. The ASBCA essentially adopted the project manager's view that the specifications required the contractor, not only to give notice, but to obtain an

agreement permitting entry into the individual units. This, the Board felt, had been emphasized by the amendment to the invitation for bid.

On appeal, the Court of Claims disagreed with the Board's conclusion of law. After considering the language of the specification and other pertinent facts and circumstances, the Court held that the contractor gave as much notice as was *reasonably* required by the "Scheduling of Work" provision and that the Navy had an implied obligation to provide access after reasonable efforts had failed.

The primary reasoning from the Court stems not only from reasonable expectations of the contractor, but from the conduct of the government representatives also. While the ASBCA referred to the actions of the project manager as "cooperation", the Court determined that the project manager, through his actions, recognized the obligations of the Navy to provide access to the units when it could not be obtained by the contractor. The suggestion of the doorknob card and the use of the master key to obtain access were substantial acts by the project manager.

The Court cited what it called a familiar principle of contract law: "the parties' contemporaneous construction of an agreement, before it has become the subject of a dispute, is entitled to great weight in its interpretation."[3] In other words, the project manager's actions clearly constituted an agreement that the government was obligated to provide access after the contractor made a reasonable attempt to gain access and that this agreement carries substantial weight when a dispute arises.

[3]*State of Arizona v. United States*, 575 F.2d 855 (Ct.Cl.1978).

Comment

This case contains all of the ingredients cited in this report that suggest the use of some form of alternative method for resolution of this dispute.

First, the administrative costs involved were significant. Just how significant will be discussed in a later chapter. For now, attention is directed to the various levels through which this case proceeded. After the Contracting Officer (C.O.) made his final decision, the case was reviewed as to its merit by the next echelon, an engineering field division (EFD). After thorough review, the EFD agreed with the C.O. and forwarded it to be heard by the ASBCA. Prior to the hearing, NAVFAC headquarters reviewed the case and prepared all of the necessary documentation that would be required before the Board. Included at the Board was personal testimony from the Navy project manager. If the case was heard in Washington, D.C., travel and per diem costs would be incurred by the government. Finally, after the Board denied the case, the contractor sought remedy through the U.S. Court of Appeals, another governmental entity, where additional time and money were spent resolving the case.

Also included in the cost considerations is the contractor's legal expenses. The Equal Access to Justice Act allows the contractor, upon determination in his favor, to seek payment from the government for the legal expenses it has incurred.

The second aspect is that of the extent of the project manager's knowledge of contracting principles. The act of a "contemporaneous construction of an agreement" proved to be a decisive factor. Even if the legal principle is not familiar, however, the Court's determination clearly makes good business sense. The contractor made every reasonable attempt to contact the occupants. His use of his evening hours was a sign of his willingness to go above and beyond the

necessary provisions. The contractor's actions should have been recognized by the government.

Third, the sense of duty to the contract by the project manager is evident as well. During the contract, he recognized the problems faced by the contractor and worked hard to help. However, when faced with the actuality of a claim at the end of the contract, his position contradicted his earlier actions. He made every attempt to locate verbiage in the specifications that would support his new position. Furthermore, his arguments were obviously convincing, as all subsequent parties agreed with him including the ASBCA.

Fourth, the amount of time involved is significant. The original claim was filed on 1 December 1978 and finally decided by the Court on 10 December 1982. This claim and the money involved were in the system for over 4 years! The contractor is also entitled to interest on money that was wrongfully withheld.

Finally, the adversarial relationship that likely developed between the contractor and the government agency can have long term impacts. In future dealings with this agency, this contractor will likely be inclined to be much more legalistic in his dealings and disinclined to "go the extra mile." The contractor's attempts to make more than reasonable efforts in this case went unnoticed and unrewarded. Instead, the government agents sought to penalize him because he did not go far enough in their view.

This case obviously does not contain a win-win attitude; both parties lost: the government as explained, and the contractor who had his money tied up in the court system for 4 years. Use of some form of alternate resolution methods could have been beneficial to both parties.

CHAPTER III

NAVY CONSTRUCTION CONTRACT ADMINISTRATION

Organization

The Navy's construction contracting agency, the Naval Facilities Engineering Command (NAVFAC) is headquartered in Alexandria, Virginia and comprised of over 1500 naval officers and 22,000 civilians located throughout the world.

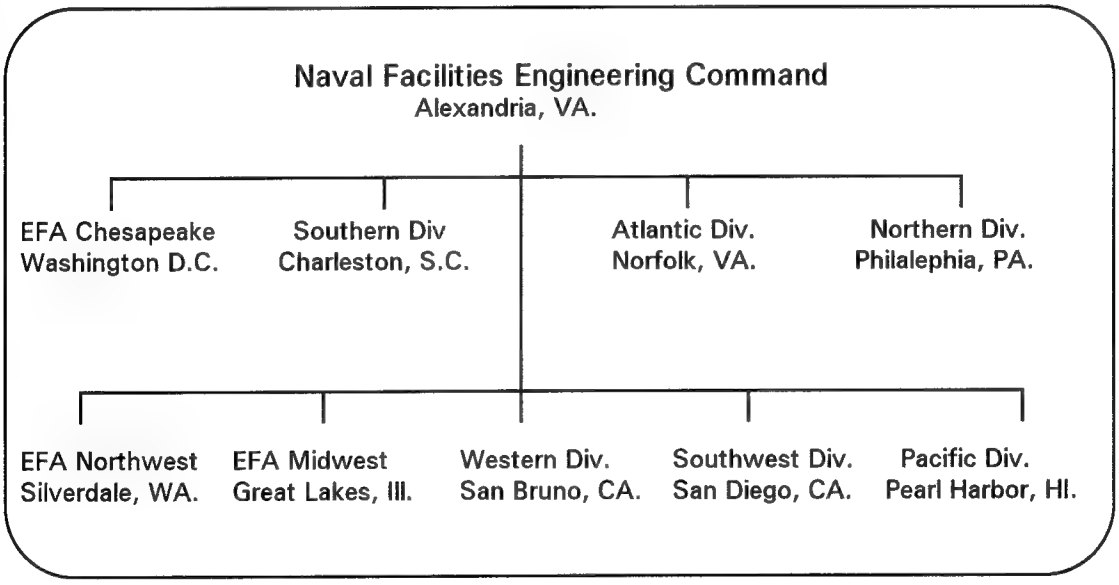

Figure 2.1 NAVFAC Organization

In addition to headquarters, which serves in an executive capacity, nine separate Engineering Field Divisions/Activities (EFD/EFA) are located throughout the United States to provide a closer, supervisory role to each individual field

office (see figure 2.1). As stated previously, the focus of this report is the Southern Division (SOUTHDIV) located in Charleston, South Carolina.

The lowest level of the Navy's construction administrative agency is referred to as the "field office" which is located at most Naval installations. While SOUTHDIV's main office is located in Charleston, its area of responsibility includes 26 states and spans a region ranging from Texas, Florida and north to Michigan. Puerto Rico is also included. Field offices are headed by a senior officer known as the Resident Officer in Charge of Construction (ROICC). Figure 2.2 illustrates a typical organization for a larger-sized ROICC office.

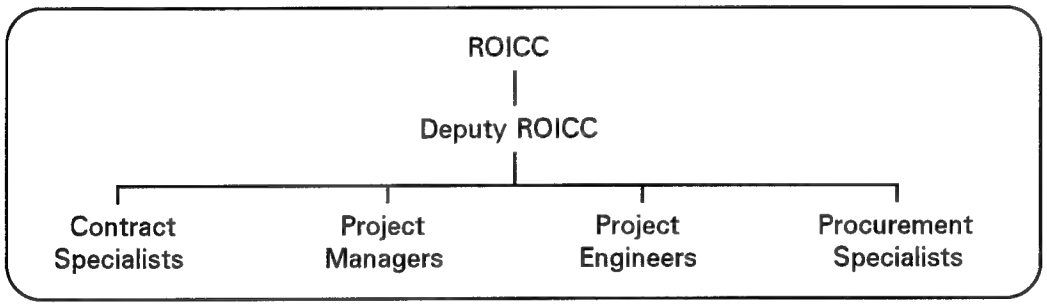

Figure 2.2 Typical ROICC Office Organization[4]

As with any organization, the size and seniority of the staff depend on the scope of responsibilities of the office. Generally speaking, the ROICC office is headed by a Navy commander or lieutenant commander with a civilian GS-12/13 serving as deputy. The contract and procurement specialists and the civilian project engineers range in rank between GS-5 and GS-12. The military project managers, the focal group of this report, are junior officers, ensign to lieutenant, with limited experience in the contracting and construction fields. Generally

[4]The chart represents a simplistic and older version of a typical ROICC staff. New procurement regulations have mandated a very distinct and separate engineering and procurement function which is not represented.

speaking, many of the junior officers serve a two-to-three year tour in a ROICC office as one of their initial assignments.

Mission

The primary mission of NAVFAC, as it relates to the Navy's construction industry, is to serve in the lead role in the administration of construction and public works-related contracts for the United States Navy and Marine Corps. The administration includes oversight on Architect/Engineer firms during project design formulation and the administration of the contract including pre-award, award, construction execution, close-out, and the disputes process.

As stated, the engineering field divisions/activities provide the critical link between the policy-making role of headquarters and the local field office.

The field office, again, the focus of this report, serves as NAVFAC's primary liaison with civilian contractors during the administration and execution of construction contracts. The Navy's image and reputation are projected by this office through the daily administration of the contracts.

The ROICC field office is primarily a stand-alone unit, providing construction contract administration to the host facility(ies), working closely with the base public works center/department, and only relying on the EFD for extraordinary support. The responsibilities for the field office basically begin once the host facility has identified a need and contracted with an architect/engineer firm for design. Constructibility reviews during the design phase fall under the purview of the ROICC project manager. Once the design is complete and funds available for execution, the pre-award and award procedures are accomplished by the ROICC procurement and contract specialists. Once awarded, the contract becomes the direct responsibility of the project manager who relies heavily on

civilian construction inspectors in the field and the contract specialists in the office. The inspector, generally an experienced technician, provides the daily monitoring of the contract, staying abreast of the contractor's progress and ensuring compliance with the plans and specifications.

The scope of responsibilities for the young military project manager has a wide range of latitude for self-judgment and decision-making. As with any contract administrator, the project manager is responsible for monitoring the contractor's overall performance throughout the duration of the contract including: approval of initial construction schedule, schedule of prices, and monthly progress payments; ensuring material compliance with technical specifications via a submittals process; negotiation of modifications to the contract; and final inspections and acceptance of the contractor's finished product.

Of primary importance to this report, the project manager plays the primary role in the modifications process. The modifications stem from several different sources. At times, the customer (the host activity) decides the original design will not satisfy the need and requests that changes be made to the contract. Other, more typical reasons, include problems with inadequately designed plans and specifications or differing site conditions. No matter what the source, the project manager is faced with assessing the issue, establishing an appropriate government estimate for the work, evaluating the contractor's proposal and, finally, negotiating and formalizing the change to the contract.

The project manager is given a tremendous amount of responsibility and, in most offices, latitude in managing his/her contracts. He/she has the closest relationship with the contractors and can set the tone for the entire contract. The ultimate responsibility for ensuring that a high-quality end product is delivered on time and within reasonable costs rests with each project manager. The win-win mentality, if developed and nurtured by the project manager throughout the

contract, can provide tremendous benefits and costs savings for the entire NAVFAC organization.

Workload

In fiscal year 93 (1 Oct 92 - 30 Sep 93), the Naval Facilities Engineering Command awarded over 16,500 construction and public works-related contracts totaling over $1.6 billion. The graphic illustration below depicts the distribution of activity for the 5 major divisions with NAVFAC.

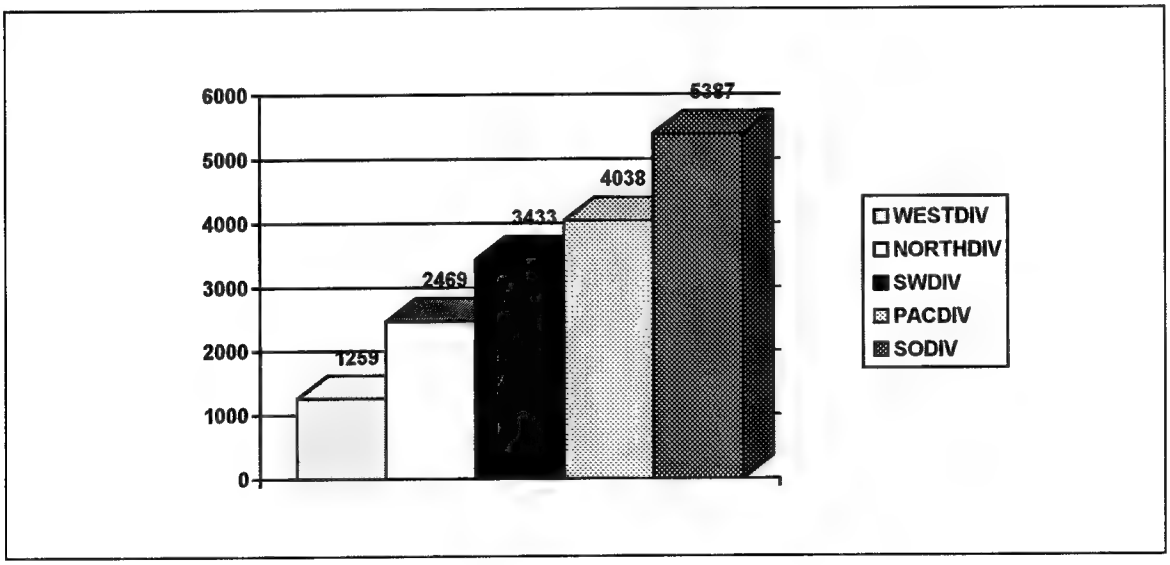

Figure 2.3 NAVFAC's FY 93 Contract Award Distribution

As shown in figure 2.3, Southern Division accounted for nearly 33% of the total number of contracts awarded by NAVFAC in FY 93. The 5,387 awards accounted for over $458.3M of the total $1.6 billion. Additionally, the total

number of contracts that were active in FY 93 for Southern Division was 5,011 valued at over $1.1 billion.

The numbers clearly indicate the volume of work and the gross volume of taxpayer dollars that are involved in NAVFAC and SOUTHDIV. The disputes, claims and potential savings associated with this contracting workload will be explored further throughout this report.

CHAPTER IV

DISPUTE ADMINISTRATION

This chapter describes the factors that tend to exacerbate the volume and complexity of disputes associated with Navy construction contracting, outlines the NAVFAC disputes process and discusses the most common types of disputes, detailing several key issues that hinder the government's chances of winning litigation. The purpose of this section is to provide some additional considerations, not merely to be critical of the problems associated Navy construction contracting. It is provided so that the young, inexperienced project manager can be aware of some of the causes of disputes in order to be more attuned to the potential pitfalls and, more importantly, be more willing to recognize the extent of the problem. This information provides the justification for choosing alternate, less expensive methods for resolving disputes.

Contract Reliability

Several factors inherent to the Navy's construction contract administration combine to compound the number, types, and complexity of disputes with which the Navy project manager is involved. With the recognition of these flaws, the project manager can better understand the nature of the business and be better prepared mentally to deal with the disputes while providing rational, cost-saving solutions.

As previously stated, the ROICC office relies on the local public works planning and engineering staff for the conception and design phases of various

construction contracts. The public works engineering personnel are responsible for the administration of the A/E contract for contract design and formulation. The primary mechanism that allows input from the ROICC staff is the constructibility reviews that are provided generally during the 90% to final design stages. The project manager, who may or may not ultimately manage that particular contract, has the opportunity to review the plans and specifications at the various stages. The constructibility review includes a scan of the documents and site visits to the potential site for discovery of obvious, blatant errors. However, several factors tend to restrict his/her ability to conduct an accurate review.

The primary factor stems from the current fiscal climate in the federal government, particularly the Department of Defense, that forces agencies to do more with less. The public works staff, attempting to control design costs, often limit the number of site visits that can be performed by the A/E firm. This has only a limited detrimental effect on contracts for new construction, but for the numerous repair/renovation contracts that are designed, this can be a primary cause of numerous changes and potential disputes. Instead of numerous investigative visits to the site, the A/E relies upon outdated and error-prone as-built drawings that attempt to depict current conditions.

The flaws in these documents stem from several sources. Given the many demands on the engineering staff, ensuring the as-built drawing files are current is not a top priority. The ROICC staff plays a hand in this also. As-built drawings are typically one of the final requirements for the construction contractor once the final product is complete. In many instances, the quality of these drawings is not always closely monitored. Unfortunately, the as-builts do not play a key role in providing a high-quality end product, on time and within budget. Poor quality as-builts often result. The poor quality does not have impacts immediately, but in the future, when renovations or repairs occur, the effects manifest themselves.

The ROICC project manager is also adversely affected by constraints on his/her time. Often, the importance of a thorough constructibility review is overshadowed by the battles that are waged daily on the contracts that are in progress. Again, the delivery to the customer of a quality end product on existing contracts is the project manager's foremost concern. Depending on the ROICC staffing and workload, many officers often manage as many as 15 separate contracts that are invariably at different stages. Conducting a pre-construction contract, attending a final inspection, and negotiating a modification for three separate and distinct contracts, all on the same day, are often part of a routine workday for many project managers. Again, the constructibility review typically suffers.

It should be noted that many offices have undertaken efforts, using Total Quality Management principles, to address the issues discussed above and provide mitigating solutions. These efforts continue and will undoubtedly provide many benefits in the future. The importance of these efforts cannot be overstated. However, for purposes of this report, the issues that have been addressed are intended simply to point out that these types of conditions and extenuating circumstances serve to exacerbate design errors, changes, and potential disputes.

Contract Principles

Another issue that, if recognized, can serve to further justify alternative dispute methods deals with the experience level of the junior project manager. Again, the intent is to admit to shortcomings regarding knowledge of the legal principles so that a win-win philosophy can be adopted. By pointing out several

key contracting issues that can undermine a government position, the project manager can be more attuned to the pitfalls and better provide himself with a more defensible position or, in cases where the government's position is weak, provide further justification for a negotiated settlement at the field office level.

The typical junior officer who begins his/her first tour on a ROICC staff has had very little, if any, exposure to the construction industry and a very limited amount of exposure to contracting principles. One 80-hour course on contract law provides a brief overview of the most important contracting principles. The information presented below highlights several key issues that deserve special attention for the project manager.

Changes Clause

Changes to construction contracts are inevitable because of their numerous sources. As many project managers can attest, the perfect set of plans and specifications has yet to be prepared. Design errors that go undetected during the constructibility review but surface after commencement of work, the buried concrete structure that was not identified on the drawings, and the changing requirements of the customer, all contribute to necessary changes to the contract. Most contractors in the industry would agree that actual or constructive changes have provided the single most fertile ground for the explosive growth of litigation in today's construction industry.[5]

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[5]Cushman, Robert F., Carpenter, David A., *Proving and Pricing Construction Claims*, Wiley Law Publications, John Wiley & Sons, New York, N. Y., 1990.

In Navy construction each contract contains the "changes" clause which reads in part:

> "(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following: (1) drawings, designs, or specifications.....(3) place of delivery.
>
> (b) Any other written or oral order from the Contracting Officer that causes a change shall be treated as a change order under this clause; provided, that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) the Contractor regards the order as a change order....
>
> .....(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contractor Officer shall make an equitable adjustment and modify the contract in writing.....no proposal for any change under paragraph (b) above shall be allowed for any costs incurred more than 20 days before the contractor gives written notices as required.....
>
> (e) The Contractor must submit any proposal under this clause within 30 days after (1) receipt of a written change order...."[6]

Several key issues that often surround this clause deal with oral modifications by an agent of the Contracting Officer, notification requirements, and the very important issue of *constructive change*. Each of these issues has been tested in the court system and the results warrant discussion.

The first paragraph simply gives the Contracting Officer authority to make changes within the general scope of the work. The changes may relate to virtually any aspect of the work whether it be materials, site, equipment, and even

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[6]Federal Acquisition Regulation § 52.243-4, Changes -- Fixed Price (April 1984).

acceleration. The clause, however, does not apply to changes that are the result of suspension, delay, or interruption of the work.

Paragraphs (b), (d), and (e) deal with the several important concepts: "constructive changes", verbal changes and changes by authorized representatives of the contracting officer and important timing issues. It is important to note the clause does include verbal changes. It also provides for orders that are not necessarily intended to be changes but, in fact, cause changes to the contract.

The project manager should recognize the disposition of the courts regarding the timing issues and be careful when focusing the government's stance around them. The clause requires the contractor to provide notice, within 20 days, that the order is interpreted as a change and provide written response to a change within 30 days.

This 20-day notification is intended to allow the government to mitigate its damages. This simply allows the government the opportunity to take corrective measures to lessen the effects of the changed condition. If the contractor fails to provide the 20-day notice, he may waive his right to recover for lost time or money arising from the owner's actions. This notice requirement has been held to be valid and enforceable. Regarding the 30-day notice requirement, the government usually must prove that the delay in giving notice somehow operated to the detriment and prejudice of the government before such delay operates as a waiver of the contractor's right to recover. If the government is unable to show that it was somehow prejudiced by the contractor's lack of strict compliance with writing and notice provisions, the claim will be decided on its merits.[7]

Another important aspect of this paragraph deals with the issuance of orders by the Contracting Officer or an authorized representative. The contractor takes

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[7]Cushman, Robert F., Carpenter, David A., Proving and Pricing Construction Claims, Wiley Law Publications, John Wiley & Sons, New York, N. Y., 1990, p. 253.

on a tremendous amount of risk if changes are implemented that have been verbalized by an overzealous engineer or inspector. However, project managers and construction representatives also must take care that their words are not interpreted as authority to proceed with changes. The requirement that a change must be in writing was once strictly enforced in numerous Courts of Claim and Boards of Contract Appeals decisions.[8] However, in *Armstrong & Co. v. United States,*[9] the Court of Claims held that performance of changed work without a written change order gave rise to an "implied contract to pay" when (1) the government had received benefit of the work and (2) the change had been performed at the oral direction of a responsible officer. The Court of Claims, recognizing the theory of an "implied in fact" contract, held that work completed based on orders from an unauthorized agent should be paid by the government.[10] *Romac, Inc. v. United States* (ASBCA Case No. 41550), provides further recognition by the courts on this issue of oral modifications by the construction representative (CONREP). In this case, the contractor sought an equitable adjustment for costs of replacing roofing insulation that was performed at the direction of oral authorization by the construction representative. The Navy argued that the CONREP had no authority to issue a change and that the government was prejudiced by a lack of notice from the contractor that this was a change. The ASBCA found that the CONREP's lack of authority did not bar recovery because his actions were indirectly approved by the officer in charge through the signing of the daily reports which indicated replacement of the insulation. By the actions of the officer in charge, the government knew or should

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[8]Government Contract Law, U.S. Air Force Institute of Technology, 10th Edition, 1988, p. 10-3.
[9]98 Ct. Cl. 519 (1943).
[10]Government Contract Law, U.S. Air Force Institute of Technology, 10th Edition, 1988, p. 10-3.

have known that the work was being performed.[11] Furthermore, the government had benefited from the new work.

The other significant issue is that of constructive change. A constructive change has been defined as "an oral or written act or omission by the contracting officer or other authorized government official which is of a nature that it has the same effect as a formal written change order under the Changes clause."[12]

Several very innocent acts can constitute a constructive change. Contract interpretations, insistence on holding to a higher standard of quality than provided by the contract, and defective specifications that lead to incurring of additional costs by the contractor all may lead to constructive changes. Government representatives should guard their actions carefully and fully understand their scope of responsibility when entering areas that can lead to constructive changes. Furthermore, silence on the part of the contracting officer may imply acceptance if the officer had knowledge of the directions or interpretations given to the contractor, as seen in the Romac case.

Simply stated, the government must recognize constructive changes as formal changes when instructions or actions by its representatives constitute added work to the contract. Once the work is performed, the government benefits and must provide an equitable adjustment based on the fair and reasonable value of the extra work performed.

Another very important and related aspect that can have significant "ripple effects" is that of constructive acceleration. Since most changes to a contract potentially affect the time permitted for completion, constructive changes can lead to acceleration. Acceleration refers to the government's reduction of the amount of

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[11]NAVFAC Trial Notes, Fall 1991 edition, p. 5.
[12]Government Contract Law, U. S. Air Force Institute of Technology, 10th Edition, 1988, p. 10-8.

time available to the contractor for the performance under the contract. In terms of constructive changes, the contractor may have performed additional work based on an act or omission rather than formal, written change, and that change adversely affects the contractor's ability to comply with the original completion schedule. If the contractor is not issued a time extension for the excusable delays, the contracting officer may be held to have constructively shortened the schedule, which has the same effect as ordering the contractor to perform faster. In order for a contractor to recover costs incurred in meeting the original schedule, it must show that: (1) it suffered an excusable delay and was, therefore, entitled to an extension of time, which was improperly withheld; (2) it was under the threat of liquidated or actual damages for failure to meet the original schedule; and (3) the contractor had, in fact, accelerated its performance and thereby incurred additional costs in order to avoid those damages.[13]

[13]*Norair Engineering Corp. v. United States*, 666 F. 2d. 546 (Ct. Cl. 1981).

CHAPTER V

LITIGATION

This chapter deals with formal litigation within the Naval Facilities Engineering Command, specifically, the procedures, and costs and time associated with the formal process. It serves as the final justification for proactive use of alternatives to the standard resolution means.

Introduction

The formal and typical process of dispute resolution within the Navy construction industry has lead to an expensive and overburdened system. As of 30 October 1993, NAVFAC had 518 active cases totaling over $594 million pending with the ASBCA.[14] The illustration depicted in figure 5.1 indicates the number of NAVFAC appeals filed with the ASBCA between 1983 and 1991.

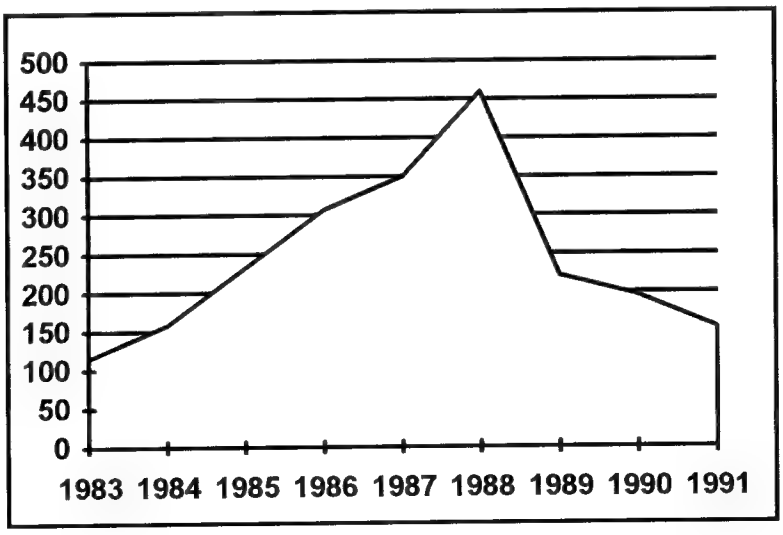

Figure 5.1 NAVFAC Appeals Filed with ASBCA

[14]NAVFAC Monthly Litigation Report dtd 5 Nov 93.

As stated previously, the issue that is not depicted is the administrative costs associated with the disputes process. To further add to the costs of litigation, the Equal Access to Justice Act (EAJA), established in 1981, provides a means for small contractors to recover reasonable fees and expenses of litigation if they are the prevailing party.[15] This has helped to encourage litigation from smaller-volume contractors by lessening the fear of entering the expensive process.

Claims Processing

The formal NAVFAC disputes process is depicted by the flowchart on page 32. The Federal Acquisition Regulation (FAR) and NAVFAC's acquisition guidelines provide explicit details regarding the processing of contractor's claims. Most engineering field activities and field offices have developed written instructions that further outline specific steps that are to be taken. The procedures outlined below have been compiled by Southern Division and represent typical instructions disseminated by all of the EFD/EFA's.

Background

The Contract Disputes Act and the Disputes clause of each contract govern the disposition of claims. The act sets a 60-day time limit for responding to claims, defines claims, and requires that only one decision, a Final Decision, be rendered on a matter in dispute. The Commander, NAVFAC has delegated authority to issue Contracting Officer's Final Decision valued at $1 million or less to the Engineering Field Divisions.

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[15] 5 U.S.C. § 504.

Action by the Field Office

Field office personnel must first determine whether the contractor's request constitutes a request for equitable adjustment or other relief under an appropriate provision of the contract or a valid claim under the Disputes clause of the contract. A claim, as defined by the Disputes clause, is a written demand or assertion by one of the parties seeking the payment of money, adjustment, or interpretation of the contract terms or other relief arising under the contract. Routine request for payment or matters not in dispute at the time compensation is being requested are not considered valid claims. Disputes involving more than $50,000 which have not been certified as required by the Disputes clause are also not valid claims.

Before the claim is accepted for action, the field office should ensure several items are covered. First, the contractor must make it clear that it wants a Final Decision under the Disputes clause. A written request is usually required. Second, if the claim is for more than $50,000, it must be certified as required, with exact wording as outlined in the Disputes clause. Third, the claim must be quantified and accompanied with a reasonable breakdown detailing the additional costs and/or time involved. Finally, the contractor must provide a reasonable explanation of why it is entitled to the claimed cost or time. This information is vital if an informed decision is to be made.

Expeditious handling of the claim is a vital requirement. Within 10 days of receipt of the claim, the field office must submit the claim to the EFD in a prescribed format. The Contract Disputes Act required decisions to be rendered within 60 days of receipt by the government on all claims less than $50,000.

In addition to the claim itself, the package sent to the EFD should also include the full text of the contract, all pertinent correspondence, daily reports, weather data, photographs, eyewitness accounts, calculations relating to the claim issue, and any other related material.

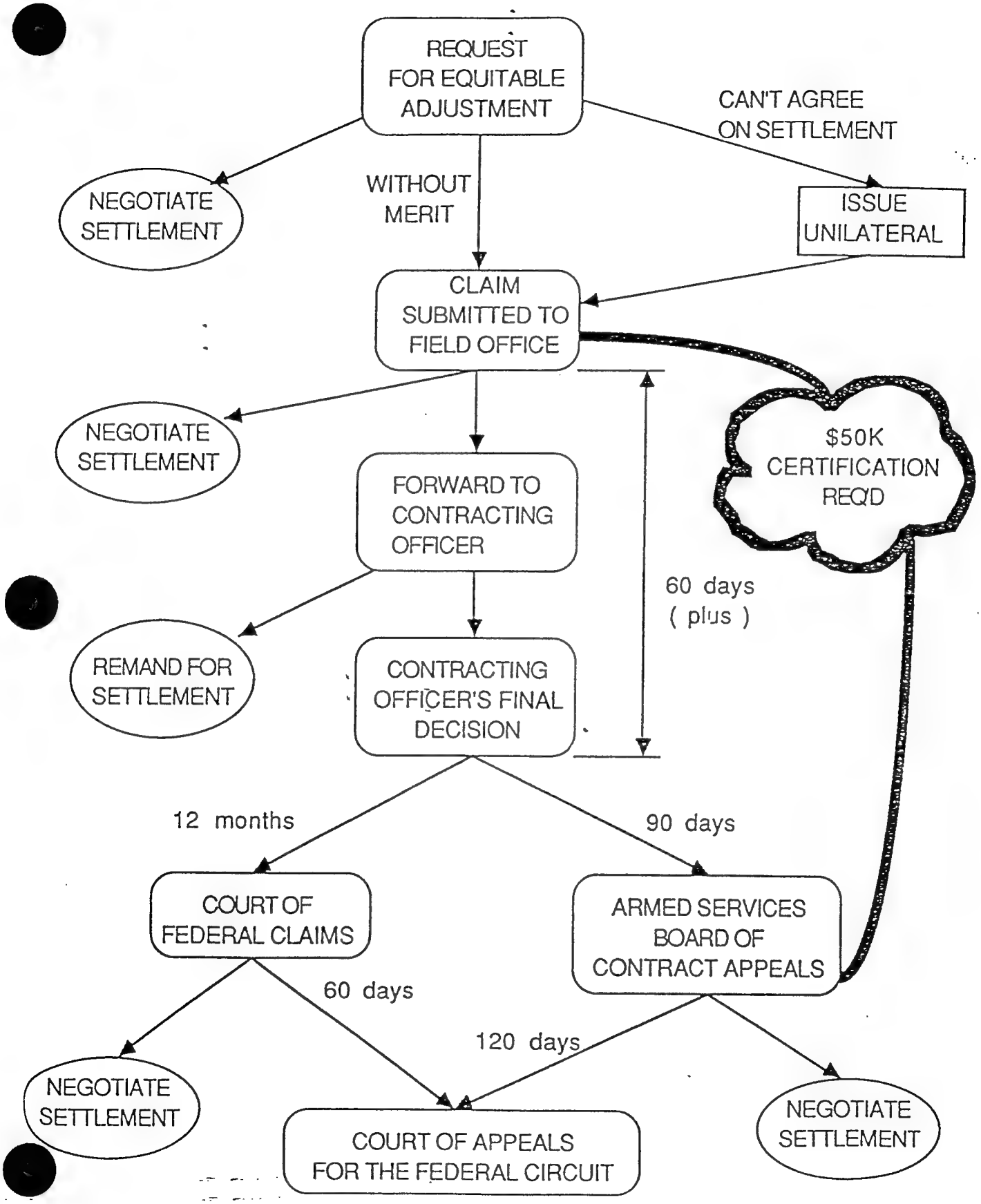
Action by EFD

After receipt of the claims package from the field office, contract specialist, legal counsel, and technical personnel combine to determine the merits of both the contractor's and government's position. A schedule is established for the technical and legal review and the preparation of the Final Decision so that the Final Decision can be issued within 60 days of receipt by the government. On claims valued at over $50,000 where a Final Decision cannot be made within 60 days, the contractor is notified in writing of the estimated Final Decision date.

The contract specialist handling the claim receives legal and technical input as to the merits of the case. If necessary, a Claims Review Board meets to resolve any differences of opinion among the reviewers. Finally, the Final Decision is made and the contractor is notified.

If contractor appeals the contracting officer's Final Decision, the EFD provides all pertinent information to NAVFAC headquarters which handles the case before the Armed Services Board of Contract Appeals, assuming the contractor chose that agency for its appeal. Department of Justice personnel become involved if the contractor elects to proceed through the Court of Federal Claims.

DISPUTES PROCESS



Cost of Litigation

After fully absorbing the many steps and the number of people involved with the claims process, it should be fairly obvious that this procedure consumes many federal dollars in administrative costs. Of course the system is necessary, but it is nonetheless very expensive.

Information on these administrative costs was limited due to the constraints of obtaining accurate cost data from each level of the disputes process. The focus of the costs is centered around the Engineering Field Division since it is the agency that acts as the hub for processing contractor's claims.

For the sake of determining the total administrative costs associated with dispute resolution, the field office costs have not been determined. The field office's administrative costs of preparing a claim for the EFD are estimated to be approximately equal to the costs associated with negotiating the dispute at the field office level. The time spent analyzing the case is approximately the same whether the case is being forwarded or remains at the field office level for negotiations. Granted, the negotiations involve time and money, but that can be offset with the elimination of the preparation of a formal claims package for the EFD. For the purposes of this report, the cost differences are negligible.

Table 5.1 presents the administrative costs associated with claims processing at the engineering field division. The analysis is based on an FY91 manpower audit conducted by NAVFAC headquarters using the general schedule salary table no. 94-RUS.

Task Description	Hours Claims <$50k	Hours Claims >$50k	Hourly Rates	Total < $50k	Total > $50k
1. Receipt, logging and preparation of claim file	0.5	1.0	$25	$12.5	$25
2. Initial review of claim	2.0	3.0	25	50	75
3. Disposition plan	1.0	2.0	25	25	50
4. Technical evaluation	16.0	16.0	25	400	400
5. Legal evaluation	4.0	4.0	40	160	160
6. Interface coordination	8.5	20.0	25	212.5	500
7. Analysis and prep. of package	32.0	68.0	25	800	1700
8. Review board/negotiations	8.0	10.0	150*	1200	1500
9. Prep./ review of final decision	6.0	16.0	40	240	640
TOTAL	78.0	140.0		$3100	$5050

Table 5.1 EFD Administrative Cost Analysis. *Based on 6 members of review board.

As shown, the total administrative costs for processing claims is approximately $3,100 for claims valued less than $50,000 and $5,050 for claims greater than $50,000. It should be noted that the hours estimated to perform each task represent the average amount of time spent on "routine" types of dispute issues. It is safe to conclude that the hours, and therefore the costs, associated with the more complex issues will be significantly higher.

On the surface, these totals do not loudly suggest more dispute resolution at the field level based on exorbitant administrative costs at the EFD. However, upon review of the analysis of the historical records of all Southern Division claims with ASBCA, the issue of administrative costs becomes a factor that warrants consideration.

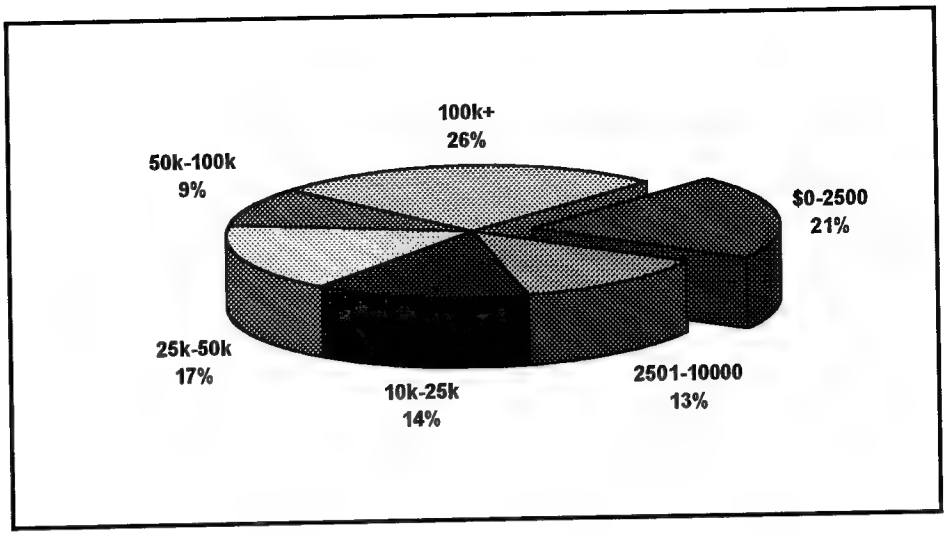


Figure 5.3 Claim value distribution

$ Range	Number of claims	% of total number	Total $
$0-2,500	115	21%	$ 42,107
$2,501-10,000	72	13%	470,687
$10,001-25,000	76	14%	1,359,631
$25,001-50,000	93	17%	3,592,678
$50,000-100,000	51	9%	3,920,320
$100,000 +	139	26%	62,271,990
Total	546	100%	$71,657,413

Table 5.2 SOUTHDIV 5-year ASBCA Claims Analysis

As shown, 21% of the SOUTHDIV cases heard by the ASBCA between FY87 and FY92 were valued at less than $2,500 yet cost the government a minimum of $3,100 to administer just at the engineering field level. A minimum of over $350,000 was spent to administer those 115 cases valued less than $2,500 each.

The total cost figures become even more significant with the consideration of the administrative costs incurred by the NAVFAC legal personnel in Washington, D.C. and by the ASBCA, another government agency. Figures from these two agencies were not available. However, one of the ASBCA trial attorneys indicated during a personal interview that the range of time he personally spent on each case varied widely, ranging from 8 hours to 32 hours of his own time. This does not include the administrative processing similar to the task descriptions shown for processing at the EFD. As strictly an estimate, it would seem logical to assume that the costs incurred by both NAVFAC headquarters and the ASBCA, including travel for depositions, expert witnesses, etc. could reach a figure close to $10,000, including the costs incurred at the EFD. Given this administrative cost, it can be seen that over one third (34% as shown in fig. 10.2) of the cases heard at the ASBCA for Southern Division alone cost the federal government more to administer than the claim was actually worth! The government could have saved over $1.8 million (187 cases @ $10,000) in administrative costs.

Some would argue however that the $1.8 million spent resolving the cases is insignificant in comparison with the total dollar amount of over $71 million for the 5-year case history. However the cost savings is not the only issue. More importantly is the time saved. The *time* spent administering the 187 cases valued less than $10,000 could have been devoted to a more thorough and detailed defense of the cases that are worth more. For these cases, the return on the amount of time invested is much greater if they are won than is the return on winning a $5,000 case that cost $10,000 to administer.

Furthermore, it bears reminding that this is an analysis of only those cases originating from Southern Division. NAVFAC and D.O.D.-wide the case load is obviously much higher.

In light of the administrative cost considerations and given the nature of the litigious construction industry, it appears logical to suggest strongly a more proactive stance on use of alternate methods of dispute resolution. In his letter to the service secretaries, Paul Williams, Chairman of the Armed Services Board of Contract Appeals, urged litigation parties to look to new and creative ways to resolve disputes especially as the Department of Defense approaches an era where personnel and resources are stretched to the limit.[16]

[16]ASBCA FY 93 Annual Report dated 31 October 1993.

CHAPTER VI

ALTERNATE DISPUTE RESOLUTION

This chapter discusses briefly the Administrative Dispute Resolution Act of 1990; identifies several approved methods of alternate dispute resolution and their advantages and disadvantages; describes the procedures that have been adopted by the Southern Division, NAVFAC; and briefly discusses the contractor's responsibilities in this new process.

ADRA of '90

Recognizing the disadvantages of an overburdened disputes process and the advantages of alternate resolution methods, the 101st Congress, in 1990, passed the Administrative Dispute Resolution Act. In section 2 of the act, the Congress describes its findings which have been echoed throughout this report. Because its findings so closely relate to the arguments contained herein, the following passage is presented verbatim:

> (1) administrative procedure, as embodied in chapter 5 of title 5, United States Code, and other statutes is intended to offer a prompt, expert, and inexpensive means of resolving disputes as an alternative to litigation in the Federal courts;
>
> (2) administrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditure of time and in a decreased likelihood of achieving consensual resolution of disputes;

(3) alternative means of dispute resolution have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious;

(4) such alternative means can lead to more creative, efficient, and sensible outcomes;

(5) such alternative means may be used advantageously in a wide variety of administrative programs;

(6) explicit authorization of the use of well-tested dispute resolution techniques will eliminate ambiguity of agency authority under existing law;

(7) Federal agencies may not only receive the benefit of techniques that were developed in the private sector, but may also take the lead in the further development and refinement of such techniques; and

(8) the availability of a wide range of dispute resolution procedures, and an increased understanding of the most effective use of such procedures, will enhance the operation of the Government and better serve the public.[17]

The act authorizes the use of many types of Alternate Dispute Resolution (ADR) methods including mediation, non-binding arbitration, binding arbitration, and dispute resolution board.

The act also list six situations in which it is recommended that ADR not be used to process a claim[18]:

(1) Where a precedent is needed, which cannot be achieved through ADR due to the confidentiality of records generated by some ADR techniques.

(2) When the matter involves significant government policy questions.

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[17]Public Law 101-552 [H.R. 2497]: November 15, 1990.
[18]SOUTHNAVFACENGCOMINST 4365.2 dated 12 Jul 93.

(3) Where an established policy must be maintained, and the potential for an aberration due to ADR cannot be allowed.

(4) Where the matter significantly affects persons or organizations that are not parties to the proceedings.

(5) Where a full and complete public record of the proceedings is important, because such a record may not be generated by the use of certain ADR techniques including dispute resolution boards.

(6) When ADR may interfere with an agency's continuing jurisdiction of a matter, when maintaining such continuing jurisdiction is important.

Methods Analysis

Mr. David DeMoske, contract specialist at Southern Division, NAVFAC, provides a very thorough analysis of the various methods in a recent point paper on Alternate Dispute Resolution. The following is a summary of his findings.

As stated, the methods prescribe by the ADRA include:

a. Field Office settlement

b. Dispute Resolution Board at EFD

c. Mediation (neutral third party)

d. Non-binding arbitration (neutral third party)

e. Binding arbitration (neutral third party)

Field Office settlement:

Cost - no additional cost

Advantages - no additional cost. Prior to adoption of ADR methods, SOUTHDIV sent approximately 20% of all claims received at the EFD back to the field office to negotiate settlement. In every instance, resulting negotiations were successful.

Disadvantages - Field personnel can believe that the EFD is settling the claim for the wrong reason when they have limited input into the process. Field personnel resent having a contractor present a letter from the EFD stating that their claim has entitlement.

Recommendation: This method of resolving claims where it receives an unbiased review at the EFD and is remanded to the ROICC settlement has worked exceedingly well. Contractors have received the hearing and result they sought and the field personnel have always successfully negotiated a settlement of the dispute. This method is preferred for the majority of the claims.

Dispute Resolution Board (DRB)

Cost - Travel expenses for the Board to travel to the project location.

Advantages - Replaces expensive litigation. Reveals strengths and weaknesses of government and contractor positions. Offers contractor a chance to express his position to a neutral party. Helps resolve claims that center around complex legal issues.

Disadvantages - Cost to send board to negotiate a claim when the field personnel can do the job just as well especially on small dollar claims.

Recommendation - Use on a case by case basis. This method should be utilized when many claims have been submitted on one contract and on large claims of a complex nature where it is difficult to apportion entitlement.

Mediation

Cost - Mediators receive $100-$150 per hour with a guaranteed minimum contract price of $300-$400.

Advantages - Same as DRB. In addition, mediators facilitate negotiations by having private discussions with both parties and pointing out weaknesses of respective positions. Mediator seen by contractor as more of a neutral party than DRB.

Disadvantages - cost control.

Recommendation - Use on a case by case basis. This method would apply where ADR is applicable but a contractor is unwilling to accept a government board to conduct the hearing.

Non-binding Arbitration

Cost - Arbitrators receive $100-$150 per hour with a guaranteed minimum contract price of $300-$400.

Advantages - Same as mediation except arbitrator does not facilitate negotiations. Arbitrator will hear both sides and render a decision.

Disadvantages - Cost control. Arbitration may require more time and expense than mediation because it usually involves some discovery and interrogatories.

Recommendation - Do not use. Mediation offers the same benefits plus facilitates negotiations at a lower cost.

Binding Arbitration

Cost - Arbitrators receive $100-$150 per hour with a guaranteed minimum contract price of $300-$400.

Advantages - Once decision is rendered no further appeals are possible. Same as mediation except arbitrator does not facilitate negotiations.

Disadvantages - Same reasons as non-binding arbitration. Contractors may be reluctant to use because of requirement to relinquish appeal rights.

Recommendation - Use on case by case basis. This method would apply where ADR is applicable but a contractor is unwilling to accept a government board to conduct the hearing and the parties wish to come to a definite resolution of the dispute.

SOUTHERN DIVISION Procedures

Southern Division has adopted use of the dispute resolution board (DRB) as the most cost effective method. The following procedures have been adopted in a formal instruction detailing the composition and procedures for the operation of the DRB.

The DRB is a panel of EFD staff who are unfamiliar with or have little prior knowledge of the claim(s) or potential claim(s) arising under or relating to a federal government contract. The DRB panel shall be composed of a Contracting Officer with warrant authority to issue final decisions on claims, a government attorney, a technical representative from the major discipline involved in the claim being processed and a representative from the department having technical oversight responsibilities on the type of contract on which the claim is submitted. The procedures used by the DRB will be as follows:

(a) The election to use the DRB must be voluntary. Either the government or the contractor may propose use of the DRB; neither party has an automatic right to use it. The agenda for the DRB must be agreed to in advance between contractor, field office representative and the DRB contracting officer. A memorandum of understanding should be presented to the contractor once agreement is reached that use of the DRB is in the best interest of the parties.

(b) All claims or potential claims presented to the DRB must be certified in writing by the prime contractor, regardless of amount, using the same certification language as the Contract Disputes Act provides for claims exceeding $50,000.

(c) The oral and written presentations of the government and contractor before the DRB will be made in a manner to facilitate fact finding by the DRB.

(d) Prior to the date set for the DRB hearing (the amount of time to be customized for each case), each side shall provide a claim brief so that the DRB members and each side's representative will be familiar with the facts of the dispute prior to the hearing. The claim brief should indicate the contractual and/or legal basis of the parties' position on the dispute. The claim briefs will be available during the hearing for reference by the DRB and each side's representatives.

(e) The contractor shall be represented by no more than three persons, none of whom may be an attorney. The persons representing the contractor before the DRB must have authority to settle the claim at the time of the hearing, including the interests of any subcontractors if it is a sponsored claim.

(f) The government shall be limited to three persons to present its position on the claim(s). None of these persons may be an attorney.

(g) The contractor and the government shall have a preset amount of time in which to present their respective sides of the dispute, uninterrupted by the other party's representatives. The general guideline is 20-60 minutes per side, depending on the complexity of the claim(s). It is each party's responsibility to allocate their time among their representatives. The contractor will go first.

(h) The government and the contractor shall have a preset amount of time for rebuttal. The general guideline is 10-20 minutes per side, depending on the complexity of the claim(s). The contractor will make his presentation first.

(i) The DRB, depending on the facts of each case, may permit cross-examination by each side. This is at the discretion of the DRB, and must be requested in advance of the hearing.

(j) The atmosphere of these proceedings shall be informal and non-confrontational. No theatrics will be tolerated by the DRB. No written transcript or tape recording of the proceedings will be permitted under any circumstances. Witnesses will not be sworn. There will be no special rules for the presentation of material. Both sides are encouraged, but not required, to provide any photographs, diagrams, charts, videotapes, or other visual aids that will assist the DRB in understanding the facts of the dispute.

(k) The DRB is tasked with issuing a written decision on both entitlement and quantum of the dispute presented within two weeks of the date of the hearing. If the facts warrant, the DRB may choose to negotiate a settlement of the claim(s) at the conclusion of the hearing.

(l) The rules of procedure may be negotiated between the parties prior to the date of the hearing as long as the DRB concurs to any changes made.

Contractor's Responsibilities

Contractors play an important role in the success or failure of alternate dispute resolution. Of course, no system has been devised that cannot be beaten. Knowing the government is going to negotiate and settle every claim based on expensive administrative costs, some contractors may decide to inundate the field office with small-dollar claims. Field offices can have procedures in place to deal with this unfortunate predicament.

Contractors must realize their incentives to work as partners in this new system. For the less reputable contractors who refuse to recognize the advantages, the old system can apply. Their claims can be forwarded through the traditional process which can potentially tie up needed resources. As word spreads of the success of alternate disputes methods the merits of the system should prevail.

CHAPTER VII

CONCLUSION

As can be seen by this cursory review of the Navy's current system used for resolving contract disputes, a significant amount of scarce resources is expended on claims that range in value from $500 to well over $1 million, including a considerable percentage valued at less than $10,000. Given the nature of the construction contracting industry, the inherent problems with the Navy's design formation process, and the recognition of the administrative costs associated with litigation, contracting personnel should be encourage to seek alternate, less expensive methods to resolve disputes. Young project managers, recognizing the potential for numerous disputes, should be encouraged to approach each contract with a "win-win" philosophy. This philosophy should be based on team building which transforms relationships from adversarial to participative.

The findings of this report echo the findings of Congress in their successful attempts to legislate alternate disputes resolution methods. Two very important points made in their findings summarize the paramount justification that has been presented.

First, "the alternate means have yielded decisions that are faster, less expensive, and less contentious." While chapter V discussed the issue of the expense of the current system, satisfactory justice was not given to the issue raised earlier concerning a "win-win" philosophy and preventing an atmosphere of adversarial relationships in the local field office. Congress recognized the

importance of the private sector's gain from programs that are less *contentious*. The improved relationships, although difficult to quantify or prove, have had tremendous impacts in the private sector and can provide the same in the federal sector.

The second emphasis is the recognition by Congress that these programs can enhance the operation of the government and *better serve the public*. No longer is the status quo acceptable. The public is becoming more and more concerned with excessive government expenditures and is demanding use of more cost-cutting measures as prescribed by alternate dispute resolutions.

Furthermore, many of the current improvement programs in the Department of Defense focus on improvements to the customer through tools like Deming's Total Quality Management. The ultimate customer in the Navy's construction industry and throughout the federal government is the general public. As dictated by TQM philosophy, the government is obliged to be on a continual course to find better ways to serve this important customer.

The use of alternate methods to resolve the numerous disputes that arise on construction contracts in the U. S. Navy not only provides costs savings and relief to an overburdened court system, it also serves as an important step toward the ultimate goal of better service to the public.